



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 19 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Melanie Sloan
Citizens for Responsibility and Ethics in Washington
1400 Eye Street, NW, Suite 450
Washington, DC 20005

RE: MUR 5991
U.S. Term Limits, Inc.

Dear Ms. Sloan:

This is in reference to the complaint you filed with the Federal Election Commission on April 9, 2008, on behalf of yourself and Doug Staggs, concerning U.S. Term Limits, Inc. Upon further review of the allegations contained in the complaint, and information provided by the respondent, the Commission, on March 5, 2009, voted to dismiss this matter and to close the file. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact Kamau Philbert, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 5991

RESPONDENT:

U.S. Term Limits, Inc.

I. INTRODUCTION

This matter involves allegations that U.S. Term Limits, Inc. ("USTL"), a 501(c)(4) non-profit corporation, incurred expenditures to broadcast an advertisement expressly advocating the senatorial candidacy of Bob Schaffer on Colorado television stations and over the Internet through its own website and the YouTube video sharing website, and failed to disclose the expenditures or use a proper disclaimer on the ads. Considering the overall circumstances of the matter, as discussed below, the Commission exercises its prosecutorial discretion to dismiss this matter and close the file.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Bob Schaffer, a former three-term congressman, is a candidate for the U.S. Senate from Colorado. Schaffer filed a Statement of Candidacy with the Commission on May 9, 2007. During the relevant period, Schaffer served on the Colorado State Board of Education and as President of the Parental Alliance for Choice in Education, a non-profit corporation that has promoted reform in Colorado's public education system. He previously served in the Colorado state legislature.

USTL describes itself as the leading advocate of term limits for American politicians. See <http://www.termlimits.org/about-us>. USTL has praised Schaffer for

1 abiding by a term limit pledge, and not running for a fourth term in the House of
2 Representatives. In March 2008, USTL aired a 30-second video advertisement, titled
3 "Thanks Bob Schaffer" on broadcast and cable TV in Colorado and on its website in
4 March 2008. The ad states:

5 Today, we have more charter schools thanks to Bob Schaffer.
6 Thanks, Bob! Thanks, Bob! Thanks, Bob! Thanks, Bob!
7 Thanks, Bob! We couldn't have done it without you. Thanks
8 for standing up for us. Even when it was really, really hard.
9 Bob does the right thing. Bob keeps his promises. Thanks,
10 Bob Schaffer, for giving my daughter a chance. Bob Schaffer
11 helped create the Colorado Charter School Act. Tell Bob to
12 keep giving us real education options. Thanks, Bob! Thanks,
13 Bob!

14
15 At the end of the ad, the words "Bob Schaffer" and "Real Education Options"
16 move across the screen, and a written disclaimer states: "Paid for by U.S. Term Limits.
17 U.S. Term Limits is responsible for the content of this advertising. Not authorized by any
18 candidate or candidate's committee. U.S. Term Limits does not endorse candidates for
19 public office." The organization's Internet address, termlimits.org, also appears at the top
20 of the screen.

21 According to USTL, the ad was created to thank Schaffer for his position on
22 charter schools. It also was reported, however, that USTL's president stated that, though
23 the organization has no position on charter schools, it recognizes that charter schools was
24 a "signature" issue for Schaffer, and that the ad recognized Shaffer for honoring his prior
25 term limit pledge. See Lynn Bartels, *"Thanks, Bob" ad spawns spoof "Big oil" replaces*
26 *'charter schools' in Schaffer spot*, Rocky Mountain News, April 9, 2008. Although
27 USTL did not reveal the cost of the advertisement in its response, a media report suggests
28 that the effort cost the group approximately \$470,000. *Id.*

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1 On March 26, 2008, after having shown the ad on its own website, USTL directed
2 its vendor, Political Media, Inc. ("Political Media"), to also post the ad on the YouTube
3 website. Later that day, a Political Media employee posted the ad on YouTube's website
4 along with a caption stating "Bob Schaffer for Senate video." The only difference
5 between the original version of the ad and the version that appeared on YouTube was this
6 new caption. USTL claims that the caption linking the ad to Schaffer's senate candidacy
7 was added without its direction, permission, or knowledge. USTL provided affidavits
8 from Political Media and the former employee, declaring that the employee added the
9 "Bob Schaffer for Senate video" caption without instructions or authorization from either
10 USTL or her supervisors at Political Media.

11 USTL claims that it was unaware of the "Bob Schaffer for Senate video" caption
12 appended to the ad on YouTube until April 9, 2008, when it was contacted by a journalist
13 inquiring about the complaint, which was filed that day. According to USTL, upon
14 discovering the existence of the caption, it immediately sought to remove the ad from
15 YouTube. USTL provided an April 16, 2006 screenshot copy of the YouTube web page
16 stating that "this account is closed." A review of the YouTube website shows that the ad,
17 now captioned "Thanks Bob – Bob Schaffer," is available on the website.

18 **B. Discussion**

19 Complainant alleges that the YouTube caption shows that the ad expressly
20 advocates Schaffer's candidacy for the U.S. Senate, and the expense for the ad constitutes
21 an undisclosed independent expenditure.

1. Independent Expenditure

An "independent expenditure" is an expenditure for a communication expressly advocating the election or defeat of a clearly identified candidate that is not coordinated with a candidate or a political party. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16. A person (other than a political committee) who makes an independent expenditure aggregating \$10,000 or more at anytime up to the 20th day before the date of an election is required to file a report describing the expenditure with the Commission within 48 hours. 2 U.S.C. § 434(g)(2)(A); 11 C.F.R. § 109.10(c). There is no allegation or information suggesting that the ad was coordinated with Schaffer, his campaign, or a political party committee. See 2 U.S.C. § 431(17) and 11 C.F.R. § 100.16. Therefore, if the ad expressly advocates Schaffer's election, the expense for the ad could be an independent expenditure.

Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 249 (1986) ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature.").

The Commission's regulations further provide that express advocacy includes communications containing an "electoral portion" that is "unmistakable, unambiguous,

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1 and suggestive of only one meaning" and about which "reasonable minds could not differ
2 as to whether it encourages actions to elect or defeat" a candidate when taken as a whole
3 and with limited reference to external events, such as the proximity to the election. See
4 11 C.F.R. § 100.22(b). In its discussion of then-newly promulgated section 100.22, the
5 Commission stated that "communications discussing or commenting on a candidate's
6 character, qualifications or accomplishments are considered express advocacy under new
7 section 100.22(b) if, in context, they have no other reasonable meaning than to encourage
8 actions to elect or defeat the candidate in question." See 60 Fed. Reg. 35292, 35295 (July
9 6, 1995).

10 a. Original Television Ad

11
12 The original TV ad without the "Bob Schaffer for Senate video" caption, which
13 did not air close to any federal election, does not qualify as express advocacy under
14 either 11 C.F.R. § 100.22(a) or (b). First, the TV ad does not appear to contain any of
15 the "magic words" or their equivalent under 11 C.F.R. § 100.22(a). Second, although
16 the ad contains positive references to Schaffer, it has no electoral portion that is
17 unmistakable, unambiguous, and suggestive of only one meaning. While the statements
18 that "Bob does the right thing" and "Bob keeps his promises" may present a positive
19 position on Schaffer's character, qualifications, or fitness for office, the original TV ad
20 highlights Schaffer's accomplishments on public education (as a former state legislator
21 and current member of the State Board of Education) and his position on a public policy
22 issue – availability of charter schools in Colorado. See 11 C.F.R. § 114.15(c)(2). In
23 sum, though Schaffer had previously declared his candidacy before the ad aired, and
24 despite the character reference, the original TV ad has a reasonable meaning other than

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1 to encourage Schaffer's election and therefore would not be an independent expenditure
2 subject to disclosure.

3 **b. The YouTube Posting**
4

5 When uploading a video onto YouTube, YouTube requests that users "enter as
6 much information about [their] video as possible in the relevant fields (including Title,
7 Description, Tags, and Category)."¹ When an employee of Political Media uploaded the
8 original TV ad to YouTube, she titled the ad "Bob Schaffer for Senate video," one of the
9 express advocacy phrases ("Smith for Congress") specified in 11 C.F.R. § 100.22(a).
10 Consequently, the costs of the YouTube version of the ad could be subject to disclosure
11 as an independent expenditure. According to YouTube, there is no cost to post.²
12 Moreover, posting a video on the YouTube website would likely involve minimal
13 expense since the posting is not technically complex.

14 USTL asserts that it should not have to disclose the disbursement and that no
15 enforcement action is warranted because it did not authorize Political Media to add the
16 "Schaffer for Senate video" caption on the YouTube ad. USTL asserts that the
17 Commission should dismiss this matter as it did in MUR 5919 (Rhode Islanders for Jobs
18 and Tax Relief, Inc.), where a corporate employee acting contrary to the corporation's
19 explicit instructions sent unauthorized corporate e-mails expressly advocating the

¹ YouTube-LLC, *Getting Started: How to Upload*, available at <http://help.youtube.com/support/youtube/bb/answers.py?answers=57924&topic=16612> (last visited March 5, 2009).

² YouTube-LLC, *About YouTube: Cost to Use YouTube*, available at <http://www.google.com/support/youtube/bb/answers.py?hl=en&answers=77443> (last visited March 5, 2009).

1 election of a candidate, and the corporation promptly retracted the e-mails and disciplined
2 the employee. *See* MUR 5919, Statement of Reasons dated September 27, 2007.

3 While USTL could be held responsible for the actions of its vendor under the
4 principles of agency law, the Commission is not pursuing enforcement action in this
5 instance. The vendor admittedly acted without USTL's authorization, and USTL took
6 prompt remedial action when it learned of the express advocacy. Notably, USTL's
7 disclaimer in the ad states that it does not endorse candidates, and Political Media should
8 have known that the new caption was inconsistent with USTL's stated purpose.
9 Additionally, the Commission has not recently pursued violations caused by confirmed
10 inadvertent vendor error. *See, e.g.,* MUR 5580 (Alaska Democratic Party), First General
11 Counsel's Report dated August 24, 2005 and Commission Certification dated August 30,
12 2005. Therefore, considering the circumstances, the Commission exercises its
13 prosecutorial discretion to dismiss the allegation that USTL failed to report an
14 independent expenditure concerning the YouTube ad at issue.

15 2. Corporate Expenditure

16 USTL is an incorporated entity. Corporations are prohibited from making
17 expenditures (including independent expenditures) for communications to those outside
18 the restricted class expressly advocating the election or defeat of a clearly identified
19 candidate, with respect to an election to any political office, including any local, State, or
20 Federal office. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). Irrespective of whether the
21 expense for the YouTube version of the TV ad is an independent expenditure or a
22 prohibited corporate expenditure, as previously discussed, *supra*, the circumstances of
23 this matter warrant dismissal.

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3. Disclaimer

Complainant also alleges that the ad did not contain a complete disclaimer, which is required for any communication that expressly advocates the election or defeat of a clearly identified candidate. *See* 2 U.S.C. § 441d(a) and (d)(2); 11 C.F.R. §§ 109.11 and 110.11. However, it appears that the YouTube version of the ad may be exempted from the disclaimer requirements under the Commission's regulations regarding Internet communications, since it appears that USTL did not have to pay YouTube for posting the ad on YouTube's website. The Commission's regulations specifically exclude Internet communications from the definition of public communication, stating that "[t]he term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site. *See* 11 C.F.R. § 100.26. (emphasis added). As previously mentioned, the available information indicates that USTL did not have to pay YouTube to place the video on its website. Therefore, the video falls within the Commission's exemption for unpaid Internet communications. *See* 71 Fed. Reg. 18589 (April 12, 2006).

Even if the Internet exemption is inapplicable, as stated above, the Commission has not recently pursued disclaimer violations that result from confirmed inadvertent vendor error. *See, e.g.,* MUR 5580 (Alaska Democratic Party), First General Counsel's Report dated August 24, 2005 and Commission Certification dated August 30, 2005. Accordingly, the Commission exercises its prosecutorial discretion to dismiss the allegation that USTL failed to include an appropriate disclaimer for the YouTube ad and closes the file in this matter.

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